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No. 278

Supreme Court of the United States

October Term, 1948.

COMMERCIAL CASUALTY INSURANCE CO., - - - - - - - - - - Petitioner,

versus

MARY ROBERTS, - - - - - - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

Supreme Court of the United States

October Term, 1948.

No. _____

COMMERCIAL CASUALTY INSURANCE CO., - *Petitioner,*

v.

MARY ROBERTS, - - - - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Sixth Circuit, a review of which is here sought, was entered on May 17, 1948 (R. 15), and an order denying a petition for rehearing was entered on July 26, 1948 (R. 20).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347(a)) and Section 1254 of the new Federal Judicial Code.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This case involves the question whether James Madison Roberts died "in consequence of the destruction by fire, of a building while the insured is therein." There was no disagreement about the facts and they are as follows (R. 6-11):

On or about March 30, 1940, the petitioner issued to James Madison ("Red") Roberts its accident policy (R. 5), which, among other things, provided in Schedule I that it would pay $10,000.00 for injuries resulting from accident which resulted in his death, and under Schedule V, headed "Double Indemnities," provided, "The amounts payable in Schedules I, II and IV shall be doubled if such injury is sustained by the insured * * * (3) in consequence of the destruction, by fire, of a building while the insured is therein (excluding firemen on duty)." The premium was $30.00 for each six months' period. Roberts paid the required premiums and died on July 27, 1945, from burns which he received as a result of a fire which apparently originated in a room which he was occupying on July 26, 1945, in the Cumberland Hotel at Middlesboro, Kentucky. Preceding his death, Mr. Roberts was the manager of the Cumberland Hotel,

which was a commercial hotel in Middlesboro, Kentucky, having a total of 120 rooms for guests, and in addition a lobby, a dining room and the usual accessory rooms for the proper operation of such a hotel. There were no apartments in the hotel, but there were suites, consisting of a sitting-room and a bedroom, with a bath between. Mr. Roberts and his wife occupied such a suite, being rooms numbered 200 and 202. In the early morning of July 26, 1945, there was a fire in the hotel, apparently originating in the suite occupied by Roberts and his wife. At the time of the fire Mr. Roberts was asleep on the couch in his sitting-room in room number 200 and, as above stated, died as a result of burns which he received. In this fire the Roberts suite was burned. All of the plastering in room 200 was burned by the fire and it was necessary to replace it. The lathing in this room was burned and charred, and it was necessary to replace it before the room could be replastered. The window frames in this room were so badly burned that it was necessary to remove the window frames and to replace them with new frames. The door leading out in the hall from room 200 was burned into and the door and door-frame had to be replaced. The carpet in the hallway was burned and it was necessary to replace a part of the carpet. The woodwork across the hall from room 200 was burned and charred for four doors down. In making the repairs, this woodwork was built up with plastic wood and refinished. Room 202, which was the bedroom of the Roberts suite, had to be replastered, and the door leading into the bathroom out of room 200 and to the closet in room 200 was burned. The total number of rooms damaged by

fire, water and smoke was 16, with 2 halls. Room 201, across the hall from the Roberts suite, was burned to some extent and 5 rooms on each side of the hall were damaged by heat, water and smoke, in addition to the actual burning of rooms 200, 201 and 202. Ten rooms were actually damaged by fire, including burning, heat, water and smoke, and in the other 6 rooms the damage was caused by heat and smoke, but none of these 6 rooms were actually burned. The whole of the floor on which the Roberts suite was located was damaged by fire, smoke and water. The first floor hall of the hotel was damaged by smoke and water. The operation of the hotel was never interrupted and there was no damage to the roof of the hotel. The fire insurance companies paid $3,397.67 for damage to the building and $668.80 for damage to the furnishings. The book value of the hotel building was $175,000.00 immediately before the first occurred and the total fire insurance carried on the hotel building was $100,000.00.

The petitioner paid the principal sum of $10,000.00 required by the policy, but declined to pay an additional $10,000.00 under the double indemnity provision. Suit was brought by the respondent, the beneficiary named in the policy, for the additional $10,000.00. On the above facts, Honorable H. Church Ford, District Judge of the United States District Court for the Eastern District of Kentucky, found that the hotel building was not destroyed, within the meaning of the policy and the decisions of the Court of Appeals of Kentucky, and entered judgment for the petitioner (R. 11). The United States Circuit Court of Appeals for the Sixth Circuit reversed the District Court on the ground that

the Roberts suite was a building and that it was destroyed (R. 15-20). In both orders of the United States Circuit Court of Appeals, Honorable Shackleford Miller, a member of that court, who prior to his appointment thereto practiced law in Kentucky and was United States District Judge for the Western District of Kentucky, dissented.

QUESTION PRESENTED.

Was the Circuit Court of Appeals in error in determining that under the decisions of the Court of Appeals of Kentucky the Roberts suite or the hotel building was destroyed by fire?

REASON RELIED ON FOR ALLOWANCE OF WRIT.

The Circuit Court of Appeals, in deciding that the Roberts suite or the hotel building was destroyed by fire, decided an important question of Kentucky law in a way probably in conflict with applicable Kentucky decisions.

PRAYER FOR WRIT.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court for its review and determination a full and complete transcript of the record and all proceedings by

the said Court had in this case, numbered and entitled on its docket No. 10550, Mary Roberts versus Commercial Casualty Insurance Company, to the end that this cause may be reviewed and determined by this Court, and for such other and further relief as to this Court may seem proper.

COMMERCIAL CASUALTY INSURANCE COMPANY,
Petitioner,

By A. SHELBY WINSTEAD,
Counsel for Petitioner.

WOODWARD, HOBSON & FULTON,
1805 Kentucky Home Life Building,
Louisville 2, Kentucky,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF COURTS BELOW.

The United States District Court did not write a formal opinion.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit was rendered on May 17, 1948, and is reported 168 F. 2d 23.

II.

JURISDICTION.

The jurisdictional statement on page 1 of the petition for writ of certiorari is adopted.

III.

STATEMENT OF THE CASE.

The Summary Statement of the Matter Involved in the petition for writ of certiorari is hereby adopted.

IV.

SPECIFICATION OF ERROR.

The Circuit Court of Appeals was in error in determining that under the decisions of the Court of Appeals of Kentucky the Roberts suite or the hotel building was destroyed by fire.

V.

ARGUMENT.

Since the Federal Court acquired jurisdiction because of diversity of citizenship, the Kentucky law must be followed. *Erie R. Co.* v. *Thompkins,* 304 U. S. 64. The Courts of Kentucky have had occasion to consider the meaning of the word "destroy."

In the case of *Davis* v. *Parker,* 200 Ky. 847, 255 S. W. 836, the lease under consideration provided that if the buildings should be destroyed in such a manner as to render them untenable the lessors would immediately replace them in the same condition. The buildings were destroyed by fire. The lessors refused to rebuild and suit was for damages for breach of the contract. The Court denied recovery, holding that because of the language used in the lease it was clear that both parties had in mind both complete and partial injury and had separated the two. In the course of the opinion the Court undertakes to define the word "destroy" as follows:

> "The word 'destroy' means 'to annihilate', 'to demolish', 'to wipe out.' The destroyed unit is not left; it becomes nonexistent. If the word stood alone in the sentence there could be no discussion or question, and, if the parties had intended to rebuild in such contingency, the natural inference is that they would have so left it. The fact that they did limit its meaning by qualifying words is a clear indication that they did not use it in its literal sense, and that they intended to express something short of total destruction."

In the case of *Louisville & Nashville R. R. Co.* v. *Commonwealth,* 190 Ky. 78, 226 S. W. 113, the meaning of the word "burned" and the meaning of the word "destroyed" was important in determining the power of the Railroad Commission to direct the railroad company to build a new station. We quote from the opinion:

> "The only part, however, of the section that we are concerned with in this case is that reading: 'And if any station used by a company is burned or otherwise destroyed, or becomes unfit for the accommodation of the public, the Railroad Commission shall notify, in writing, the manager or chief officer in this state of the company owning or using such station to rebuild or repair the same, as the case may be, and such company shall, within ninety days after such notice, comply with the requirements thereof.'
>
> "It is insisted by counsel for the complainants that this part of the section might fairly be construed to authorize the Railroad Commission to order a new station to be built when by reason of traffic and other conditions the existing one was not sufficient for or not suitable for the accommodation of the public; while counsel for the railroad company contend that the Railroad Commission has no authority to order a station to be rebuilt, or, in other words, a new station built, unless the one previously located at the place has been burned or otherwise destroyed.
>
> "This statute must be construed according to the rules applicable to other statutes; that is, so interpreted as to carry out the reasonable intention of the Legislature as expressed in the statute

when read and considered as a whole. When so read and considered, it contemplates two conditions; the first arises when a station is 'burned or otherwise destroyed'; the second, when a station 'becomes unfit for the accommodation of the public.' When the first condition exists the commission has authority to notify the company to 'rebuild the station'; when the second condition exists it has authority to notify the company to 'repair the same.'

"The word 'burned' and the word 'destroyed' have reference to a state of case in which the station has been rendered wholly unfit for its intended use by fire or other cause. If a station has been 'burned' and thereby totally destroyed or injured to such extent as to make it wholly unfit for use, it seems clear that a new station must be built to take its place, and so, if it was totally destroyed, or so injured by other cause than fire as to make it wholly unfit for use, a new station must be built to take its place. In either of these contingencies it is plain that the station would not be merely 'unfit for the accommodation of the public,' as there would be in effect no station at that place in existence. On the other hand, when a station merely becomes 'unfit for the accommodation of the public,' the reasonable meaning is that there is a station in existence at the place the only fault or defect in which is caused by the fact that it has been permitted to become unfit for the accommodation of the public, and in such a state of case the statute provides that the company shall 'repair the same'; that is to say, remove the faults or defects that render it unfit for the accommodation of the public.

"The words 'burned' and 'destroyed' are in common usage, and when applied to buildings generally mean that the building has been made completely useless for the purpose intended. These words have no technical meaning, as may be seen by an examination of Webster's Dictionary and Words and Phrases. The Legislature uses them interchangeably, and as meaning in effect the same thing, but produced by different causes. Accordingly we do not think this statute can fairly be construed to authorize the Railroad Commission to order the company to rebuild a station when the former one has not been 'burned or otherwise destroyed,' but is only 'unfit for the accommodation of the public.' If the existing station is unfit for the accommodation of the public, the authority of the commission is limited to notifying the company to repair the same so that it may be made fit for the accommodation of the public. Railroad stations or depots, as they are commonly called, are necessary parts of every railroad system, and the purpose of the Legislature was twofold; first, to require railroad companies to have stations; and, second, to maintain them in such condition as to be fit for the public accommodation. If an existing station building is burned or otherwise destroyed, and this means completely demolished as a station building, or so nearly so as to be destroyed in the usual meaning of that word, the Railroad Commission may order a station to be built; and if the company fails to comply with this order, it is subject to the penalties denounced in Section 793."

The sole question, therefore, is whether the hotel building or the Roberts suite was destroyed within the meaning of the policy in view of the Kentucky rule that the word "destroy" means "to annihilate" "to demolish" "to wipe out" with the destroyed unit left non-existent. We believe that it will not be contended that the hotel building was destroyed. Out of a total of 120 rooms only 16 rooms were damaged to any extent and the operation of the hotel was never interrupted.

The Roberts suite consisted of rooms numbered 200 and 202 and the bath in between. With respect to this suite we find that all the plastering in room 200 was burned and replaced; the lathing in this room was burned and charred and it was necessary to replace it before it could be replastered. The window frames in this room were so badly burned that it was necessary to replace them with new frames; the door leading into the hall from this room was burned and the door and door frame had to be replaced; the door leading into the bath room out of this room and the closet in this room were burned and room 202 had to be replastered. In other words, only those items which are considered as finishings were damaged. Not an item which is considered structural, such as a joist or a stud, was even damaged. If these two rooms and bath, rather than being an integral part of a hotel building, had constituted a unit in itself in a tourist court for example, and a fire in this unit had damaged in one room only plastering and in the other room, the plastering, lathes, two doors and a window and window frame, we do not believe it could be successfully con-

tended that this unit was destroyed under any definition of that word and certainly not under the definition of the Kentucky Court.

Respectfully submitted,

COMMERCIAL CASUALTY INSURANCE COMPANY,
Petitioner,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

COMMERCIAL CASUALTY INSURANCE CO.,
Petitioner,
vs.
MARY ROBERTS,
Respondent.
No. 278.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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SUPREME COURT OF THE UNITED STATES.

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COMMERCIAL CASUALTY INSURANCE CO.,
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vs.
MARY ROBERTS,
Respondent.
No. 278.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The respondent, Mary Roberts, adopts the statement of facts set out in the Petition for Writ of Certiorari.

ARGUMENT.

The petitioner, Commercial Casualty Insurance Co., assigns as the reason relied on for the allowance of the writ of certiorari that the Circuit Court of Appeals decided an important question of Kentucky law in a way probably in conflict with the applicable Kentucky decisions. The court below held that the hotel suite occupied by the deceased insured was a building as that term was used in an accident insurance policy providing for double indemnity in the event the insured came to his death as the result of the destruction by fire of a building while the insured was therein. The court below further held that where the result of fire is such as to require substantial structural changes in the damaged premises and to render them untenantable for a substantial period of time, there has been destruction within the meaning of the policy provisions.

The case presented calls for the construction of a contract of insurance. There is no rule of law here applicable as established by Kentucky decisions other than the one which requires an insurance policy to be construed most strongly against the insured. There is no Kentucky case, so far as we are advised, undertaking to determine the meaning of the word "destroy" as used in an insurance policy in the connection the word is here used.

Counsel for the petitioner takes two Kentucky cases, one involving a lease and the other involving a statute and undertakes to argue from these two cases that the word "destroy" has a settled judicial meaning in Kentucky equivalent to annihilation.

In Davis v. Parker, 200 Ky. 847, 255 S. W. 836, the court was called on to construe a lease providing that if the building should be destroyed in such a manner as to render it untenantable, the lessors would immediately replace it

in the same condition. In this case the court merely held that all of the language of the lease showed an intention to express something short of total destruction.

The other case upon which petitioner relies is that of Louisville & Nashville R. R. Co. v. Commonwealth, 190 Ky. 78, 226 S. W. 113. Here the court is called upon to construe a statute containing the word "destroyed." As used in this statute the court held that the word "burned" and the word "destroyed" have reference to a state of case in which a railroad station has been rendered wholly unfit for its intended use by fire or other cause. This opinion then states, "If a station has been 'burned' and thereby totally destroyed or injured to such extent as to make it wholly unfit for use, it seems clear that a new station must be built to take its place . . ." Further in the opinion, we find this opinion. "The words 'burned' and 'destroyed' are in common usage, and when applied to buildings generally mean that the building has been made completely useless for the purpose intended."

It would seem that as used in this connection the word "destroyed" means something less than total annihilation and that the statutory requirement was satisfied where the building was rendered unfit for the purpose intended.

Another statute of Kentucky wherein the word "destroyed" is found has to do with the landlord and tenant relationship. KRS 383.170 provides that unless the contrary is expressly provided for in the written contract, the agreement of a lessee that he will repair or leave the premises in repair, shall not bind him to erect similar buildings if without his fault or neglect, the buildings are destroyed by fire or other casualty. In three cases, Winter v. Taylor, 224 Ky. 827, 7 S. W. 2d 209; Sun Insurance Office v. Varble, 103 Ky. 758, 46 S. W. 486; and King & Metzger v. Cassel, 150 Ky. 537, 150 S. W. 682, the Kentucky Court of

Appeals held that the word "destroy" as used in this statute does not mean total destruction, but includes any cases where fire or other casualty substantially injures the premises.

We, therefore, see that a review of the Kentucky cases indicates only that the word "destroy" will be given a meaning according to the text in which it is used. The degree of destruction required will vary as required to give effect to the intention of the parties to a contract or to the intention of the legislature where a statute is involved.

The court below did not decide any question of Kentucky law, but merely construed an insurance policy in accordance with the settled rule of construction in Kentucky that in case of ambiguities, doubts should be resolved against the insurance company.

Respectfully submitted,

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